

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, ) CRIMINAL ACTION FILE  
v. ) NO. 1:16-CR-00237  
 )  
JAMES G. MALONEY, )  
 )  
Defendant. )

BEFORE THE HONORABLE JUSTIN S. ANAND  
TRANSCRIPT OF AUDIOTAPED PROCEEDINGS  
SEPTEMBER 14, 2016

APPEARANCES:

For the Plaintiff: OFFICE OF THE U.S. ATTORNEY  
(By: JOHN RUSSELL PHILLIPS.  
STEPHEN H. McCLAIN)

For the Defendant: GILLEN WITHERS & LAKE, LLC  
(By: CRAIG A. GILLEN  
ANTHONY C. LAKE)

Proceedings recorded by mechanical stenography  
and computer-aided transcript produced by

JANA B. COLTER, RMR, CRR, CRC  
Realtime Systems Administrator  
Official Court Reporter  
2394 U.S. Courthouse  
75 Ted Turner Drive, SW  
Atlanta, Georgia 30303  
(404) 215-1456

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P R O C E E D I N G S

(Atlanta, Fulton County, Georgia, SEPTEMBER 14, 2016, in open court.)

THE COURT: -- the United States of America versus James Maloney 1:16-CR-237. Representing the United States are Assistant U.S. Attorneys Russell Phillips and Steve McClain. Representing the defendant are Craig Gillen and Anthony Lake. So we're here for a pretrial conference. And I've received the motions that the defense has filed. And before we get to them, though, let me ask the government has all Rule 16 discovery been produced at this point?

MR. PHILLIPS: Your Honor, it has. In fact, we've turned over more than we were required to. We've turned over all of the 302s at the time of the initial discovery production.

Defense counsel notified us last week though that there was a problem with one of the disks that we produced, that some of the information was not readable. So we're in the process of getting that fixed. They've also provided us with a portable hard drive to copy some computer hard drives that we obtained from Georgia Tech and the FBI is taking care of that right now. We'll get those things to them as soon as possible.

THE COURT: Is there any -- any searches that were

1 done here or any statements obtained from the defendant?

2 MR. PHILLIPS: No, no.

3 THE COURT: Okay. All right.

4 MR. GILLEN: Your Honor, may I just address briefly  
5 the Rule 16?

6 THE COURT: You may.

7 MR. GILLEN: What happened is, is that at  
8 arraignment, we were given disks. And then as the Court may  
9 remember, I had a bad back, a sciatic nerve issue, and was out  
10 of the game for a while. When we began looking at the  
11 discovery, we -- and I have, you know, looked at virtually --  
12 you know, there are tens of thousands, I believe, of pages  
13 that we have -- that we have looked at. We -- certain things  
14 were obviously missing, and, for example, a recording that we  
15 had actually listened to prior to indictment that the  
16 government was kind enough to allow us to listen to, and that  
17 was not contained in the material that we had.

18 Other documents, which we then -- we then sent an  
19 email either last week or ten days ago, whenever it was,  
20 Mr. Lake sent an email saying, you know, we don't seem to have  
21 this. And then Mr. Phillips was kind enough to respond back  
22 and said, well, you should check out serial number so-and-so  
23 and so-and-so, which we don't have.

24 Now, what we actually had is it seems like they gave  
25 us on some disks that we reviewed the same thing twice, so

1 we -- you know, either we don't have it -- certainly I can  
2 state this. I have done my very best and spent days and days  
3 looking at the material that they have provided that we can  
4 read. We don't have a lot of the Rule 16, which is why we  
5 were asking for additional time to file motions because --  
6 we're not saying it's anybody's fault. We're just saying the  
7 reality is that we don't have it in a way that we can read it  
8 and review it, so we would ask for additional time.

9 THE COURT: Okay.

10 MR. GILLEN: Subject to getting it and being able to  
11 review it. It's just something that happens in the course of  
12 electronic discovery in our day and age, so we would ask the  
13 Court's indulgence in that respect.

14 THE COURT: And I don't have a problem with the  
15 additional time. I know how things work in that regard. I  
16 was trying to make sure that that process was underway and --  
17 but for, it sounds like, technical difficulties or working  
18 through technical issues, it sounds like -- at least the  
19 government's view is the discovery has been produced or has  
20 been made available?

21 MR. PHILLIPS: Absolutely.

22 THE COURT: Okay.

23 MR. PHILLIPS: And we're not trying to keep them from  
24 having it. We're -- if they say they didn't get it in the  
25 first production, we're doing everything we can to assist them

1 in getting it as soon as possible.

2 THE COURT: Okay. So we'll get to the motions for  
3 new -- or to file new motions and we'll set a schedule in a  
4 minute. But let me go through some of the other things that  
5 we have here. I have the notice that is to be filed under  
6 seal, which I take it there's no opposition to filing it under  
7 seal?

8 MR. PHILLIPS: Actually, there is, Your Honor.

9 THE COURT: Oh, there is. Okay.

10 MR. PHILLIPS: We did not consent to that. They  
11 asked us ahead of time if we would. We did not consent to  
12 that because we checked with the national security coordinator  
13 in our office and we were instructed not to do that.

14 First of all, you know, with respect to defense  
15 counsel and the Court, we believe this is a red herring. This  
16 is a classic case of graymail where the defendant is  
17 threatening the United States with revealing classified  
18 information that he obtained in the course of his job if we  
19 don't stop the prosecution. We believe that's what it's  
20 about. And so by consenting to filing it under seal, we  
21 believe that -- that makes it appear that the government  
22 thinks that there's something that needs to be hidden.

23 The information that the defendant claims that he  
24 intends to rely on in his defense, we believe, is completely  
25 irrelevant. The fact that the defendant had a top-secret

1 security clearance, which he was required to have to perform  
2 his job at GTRI, doesn't mean that the information that he  
3 obtained through the holding of that top-secret security  
4 clearance is automatically relevant to this criminal case.

5           The indictment that we filed in this case is very  
6 specific and it talks about the defendant obtaining money  
7 illegally by engaging in two different types of fraud: One is  
8 using a Georgia Tech credit card, called a P-Card, to charge  
9 personal expenses. And the other is by engaging in private  
10 consulting contracts while he was working for Georgia Tech.  
11 And part of that has to do with depriving Georgia Tech of the  
12 income that it should have had from that consulting.

13           And then, to add insult to injury, he billed his  
14 private consulting work to the government on this classified  
15 contract. And so the fact that he did those things is not  
16 classified. And as I understand it from the defendant's  
17 motion, what he seeks to do is to, you know, basically hold  
18 the government hostage and say if you don't stop prosecuting  
19 me, I'm going to tell the world what this classified contract  
20 was about. And that's not appropriate.

21           THE COURT: All right. So, well, there's a couple of  
22 matters, as a perhaps ministerial matter, I have the motion to  
23 file under seal. The government is not -- it sounds like --

24           MR. PHILLIPS: We do oppose that.

25           THE COURT: -- is not taking the position that

1 anything that is within the four corners of the notice of  
2 intent reveals anything that requires sealing, and that --  
3 that, of course, doesn't -- doesn't get to the next level of  
4 questions, which is the intent to get into classified  
5 information, but it sounds like there's no need, at least from  
6 the government's perspective, to seal this. This can be filed  
7 in the normal course.

8 MR. PHILLIPS: Not from our perspective, with one  
9 possible exception, and that is that the defendant has  
10 identified by name the sponsor of the classified contract.  
11 And I've reviewed the contract. The contract does not say on  
12 its face who the sponsor is, it just says the United States,  
13 but in the notice of intent, the defendant has identified that  
14 government agency by name.

15 THE COURT: Okay. And that would be something  
16 that --

17 MR. PHILLIPS: I'm not -- I'm not sure about that,  
18 Your Honor.

19 THE COURT: Okay.

20 MR. PHILLIPS: I've asked the agents to find out  
21 about that, whether they believe that in itself is classified.  
22 I'm just flagging that issue for the Court.

23 THE COURT: All right.

24 MR. PHILLIPS: I don't know the answer. But we are  
25 in the process of trying to consult with the National Security

1 Division. Obviously, this is an unusual matter for us. And  
2 we're going to be getting some guidance from some experts  
3 about that. But as we understand it, the issue now is a  
4 procedural one. What do we do from this point. How do we  
5 bring this matter to a head and get it resolved. And it's my  
6 understanding, Your Honor, that the Classified Information  
7 Procedures Act, CIPA, says that the prosecutor remains  
8 responsible for taking reasonable precautions against the  
9 unauthorized disclosure of classified information during the  
10 case. And that responsibility applies whether it's the  
11 government seeking to use that information in its case in  
12 chief or whether the defendant has notified the government  
13 that he plans to rely on that in his defense.

14           So we -- we understand that it's our burden to go  
15 forward. And the *Moussaoui* case says -- that's a case from  
16 the Fourth Circuit in 2003 -- that once the defendant has  
17 indicated that he plans to disclose classified information,  
18 the government may then request a hearing at which the  
19 district court must determine whether the classified  
20 information in question is relevant and admissible. So I  
21 think that's the next step. The Court is going to have to  
22 find out what it is the defendant plans to disclose --

23           THE COURT: Right.

24           MR. PHILLIPS: -- and make a determination as to  
25 whether he should be allowed to proceed or whether the



1 information, as the government contends, is irrelevant.  
2 Obviously that brings about some other procedural problems.  
3 The information that the defendant claims he's going to rely  
4 on is, according to him, classified. And so who are the  
5 people who are allowed to hear that? Do defense counsel have  
6 security clearances that allow them to be party to that? If  
7 not, that's an issue that needs to be resolved.

8 THE COURT: Right. Well, I was going to -- the  
9 immediate step is, you know, what do I do with this motion.  
10 So I'm going to hold it in abeyance for a period while it  
11 sounds like you look into whether there's anything in here  
12 that needs to be filed under seal or not.

13 MR. PHILLIPS: And we're doing that immediately.

14 THE COURT: Okay. All right. So I'll just hold on  
15 to it. And the -- if there's something in there that warrants  
16 sealing, then -- and it sounds like you think at most it may  
17 be minimal, then we would simply -- what I would suggest is  
18 redact that, file the rest under -- in the regular docket, and  
19 file the unredacted version under seal. That would be how I  
20 would think we would handle it, like we would with anything  
21 that has mostly non -- mostly public but some nonpublic  
22 information in it, whether -- including personal  
23 identification information of witnesses and the like. That's  
24 how I think we would handle it, but --

25 MR. PHILLIPS: I think that's an appropriate

1 response.

2 THE COURT: Okay.

3 MR. PHILLIPS: That's what we would suggest.

4 THE COURT: But in a moment -- I'll hold on to it.

5 And I think as part of a schedule we need to talk about, but  
6 let's -- that would, I think, be the next step. Your position  
7 is, it sounds like graymail. What they're going to say, I  
8 believe, is to justify or explain the relations of certain  
9 expenses to the contract, we need to get into what the  
10 contract was about and what we were doing, whether it's flat  
11 screen TVs or the ATVs or whatever it is, I'm just throwing  
12 out examples of some of the items, these may or may not have  
13 been part of the work we were doing and here's why and that  
14 might get into classified information. Does that -- does that  
15 sort of summarize what your position is?

16 MR. GILLEN: Thank you, Your Honor. I'll briefly  
17 sort of respond in part to what Mr. Phillips said, and then  
18 explain further what (indiscernible) to the Court.

19 In their indictment they talk about Dr. Maloney  
20 working for intelligence agencies. In their indictment they  
21 specifically mention by letter and number this contract. And  
22 they specifically say that fraud was committed under that  
23 contract. Two years ago, we told the United States Attorney's  
24 Office about the sensitive nature of this contract and  
25 Dr. Maloney's work on behalf of the United States and one of

1 its agencies. Two years ago. Now, this is no surprise to  
2 them. Now, what they are saying here and what they fail to  
3 understand is the very purpose and nature of the work done,  
4 and even in the contract that they provided in discovery, as  
5 we mention in our notice, there is reference to how the  
6 material is to be handled, some of the material is to be  
7 handled at top secret.

8 Now, this is isn't graymail. This is -- they chose  
9 to take this project, that number, and claim fraud. And  
10 Dr. Maloney has every right to explain exactly why that  
11 allegation is absolutely meritless. So it's not graymail.  
12 And I don't -- I don't know if anybody in this courtroom has  
13 been involved in CIPA before, but I've had multiple days of  
14 CIPA hearings. In Iran-Contra, that's all we did prior to the  
15 CIA trials is hold CIPA hearings. So I understand the purpose  
16 of CIPA and I understand the purpose of the statute. And the  
17 purpose of the statute, we're not trying to graymail the  
18 United States. They started this fight. What we're trying to  
19 do, using the process and using the statute is to, in an  
20 organized way -- and it's going to take time. If security  
21 clearances have to be obtained, then security clearances have  
22 to be obtained for court personnel, for all attorneys  
23 involved, whatever. But we -- the process allows then for the  
24 Court to look through the material, to look through exactly  
25 what our position would be. And frankly, when we get to the

1 end of the CIPA hearings, we're going to be asking the Court  
2 to produce, from the United States agencies, information that  
3 would support what we assert. Because we believe that they  
4 have information that would be directly relevant and  
5 supportive of our position. So it's not graymail. It is --  
6 it is an explanation to a defense of their precise charges in  
7 this indictment.

8           Now, so having said that, the reason why -- and  
9 frankly, you know, we took an abundance of caution in seeking  
10 to have it filed under seal. To us, if they want to have it  
11 public, that's their business, and that's fine with us. We  
12 did that and we wanted to structure that notice in a way that  
13 triggered the elements under *Collins*, alerted the Court to  
14 what was about -- you know, to our defense, which is what we  
15 do under the CIPA Act, or under CIPA, and then begin the  
16 process of working through this. It's a cumbersome,  
17 time-consuming process. But this statute was specifically  
18 made in order to handle situations like this, in order to take  
19 criminal cases and deal with people who had, either from the  
20 intelligence community or who would access the information  
21 that was classified, and then make determinations about  
22 relevance, and in the end, if the Court believes that  
23 narratives, defense narratives are necessary -- you know, in  
24 Iran-Contra, we had virtually every representative of nearly  
25 every intelligence agency in the courtroom making on-the-spot

1 determinations about declassification. We're not going to  
2 need that here. But we will need, in our review, a CIPA  
3 hearing, thus the notice that triggered alerting the Court  
4 we're not running around and saying things inappropriately in  
5 open court or on the public record that should not be there.  
6 That's the reason why we did it the way we did it.

7 THE COURT: Okay.

8 MR. PHILLIPS: Your Honor, may I respond just  
9 briefly?

10 THE COURT: You may.

11 MR. PHILLIPS: Mr. Gillen makes it sound like he's  
12 already in possession of this classified information. He's  
13 representing to the Court that this is a valid defense. I  
14 don't know how he can do that without already being in  
15 possession of the facts. And if Mr. Maloney, the defendant,  
16 revealed classified information to his attorneys, that --  
17 that's a problem. And it's not a problem that can be swept  
18 under the rug by filing the notice of intent under seal. So I  
19 don't know whether that information has already been provided  
20 to Mr. Gillen or he's just assuming that his client has a  
21 valid defense because his client says he has a valid defense,  
22 but I think that's -- that's a problem.

23 THE COURT: Well --

24 MR. PHILLIPS: And the second thing, just briefly --

25 THE COURT: Um-hmm.

1 MR. PHILLIPS: -- back to the issue of whether it  
2 should be sealed, I notice on Page 4 of the notice in the  
3 footnote that the defendant says that the association of the  
4 sponsor with the contractor is classified unclassified, so --

5 THE COURT: Okay.

6 MR. PHILLIPS: I assume that means that the identity  
7 of the sponsor is itself unclassified.

8 THE COURT: Okay.

9 MR. PHILLIPS: If that's the case, then our position  
10 is that the motion or the notice of intent should be filed as  
11 is and not under seal.

12 THE COURT: Well, there's two -- again, the issue  
13 here is, first, a motion to file under seal, I'm going to rule  
14 on that. The way I interpreted the notice was that it did not  
15 itself reveal the content of classified information but just  
16 flagged the fact that that's going to be a subject of inquiry  
17 in this case for the defense's position, and therefore, sort  
18 of triggering the procedures to start getting into place to  
19 get into that further.

20 I mean, my reaction to what I'm hearing here is that,  
21 like a lot of discovery disputes -- and I don't know,  
22 Mr. Phillips, if this is what you're proposing, I don't know,  
23 I can't, based on what I have here in front of me, really say  
24 one way or the other that the information is or would not be  
25 potentially discoverable or Brady or not Brady or relevant or

1 admissible. I mean, that's something -- because I don't know  
2 what we're talking about here, I don't know -- are we talking  
3 about specific expenditures that have a specific justification  
4 that need to get into the details of the agreement? That's  
5 what I've interpreted is the issue.

6 MR. GILLEN: What the notice allows the Court to see,  
7 and we think, frankly, that the notice itself, you know -- if  
8 they want to have an agency redaction, that's fine with us.  
9 We did that in an abundance of caution.

10 THE COURT: Um-hmm.

11 MR. GILLEN: But we -- frankly, in looking at it, I  
12 don't think there is anything classified in there, frankly.  
13 But in reference to Mr. Phillips' remark, if the government  
14 would read their discovery and would read the contract that is  
15 the basis for this project that they name specifically in  
16 their indictment, then they would understand what we meant in  
17 the footnote. Because the nature of the contract itself in  
18 terms of sort of the generic relationship, that is something  
19 that the contract deems to be, my recollection from reading  
20 them, is not classified.

21 However, then we get into the point where in terms  
22 of -- in terms of what it's done, in terms of how certain  
23 things are handled, then I think we have two classifications,  
24 one top secret and the other secret. The bottom line is, it  
25 would be astounding to me if the government took the position

1 that the -- that a discovery about the details of the  
2 interaction between Dr. Maloney and the United States agency  
3 would not be classified, it would be astounding.

4 What we need to do is we've triggered the statute,  
5 we've put sufficient information to the Court to allow the  
6 Court to understand the nature of our intent to proceed along  
7 these lines and then let's follow the statute, let's follow  
8 the regs on this and let's -- let's have our hearing and then  
9 let the Court decide.

10 THE COURT: I mean, I think my reaction to this is  
11 I'm going to need it to be teed up, and if it's a -- if it's a  
12 motion/hearing that's protected under CIPA, then so be it, but  
13 I'm going to need it to be teed up as a motion to compel of  
14 sorts, to say this is the specific information or category of  
15 information that I'm looking for and here's why. Do you  
16 understand what I'm saying?

17 To say this is what they have that I need and/or this  
18 is the specific information that I'm looking to reveal and  
19 here's why, because I can't -- I mean, this is obviously --  
20 this is not concrete enough for me to make a determination,  
21 that's the level of detail, and it sounds like that's maybe  
22 something that has to be under the auspices of CIPA.

23 MR. GILLEN: Yes, that's correct.

24 THE COURT: But I'm going to need it to be more  
25 concrete than anything we have here.



1 MR. GILLEN: Which is the purpose for the hearing.  
2 This notice is like, hey, Court, government, this is what we  
3 intend, we need to address this and let's get under the rubric  
4 of CIPA. That's all we're saying. And we need to do that.  
5 Now -- and once everything is covered, once everything is  
6 protected, then -- then Dr. Maloney will have the opportunity  
7 to be -- to be a lot more specific and will be a lot -- will  
8 be able to be a lot more specific about what we're asking for  
9 from the government.

10 There are two phases here, what Dr. Maloney can and  
11 cannot say himself, and what Dr. Maloney would seek from the  
12 United States agency to produce information which would be  
13 relevant to and supportive of his position. And so it seems  
14 to me, Your Honor, and I understand that we have to have the  
15 details, we're going to do whatever the Court directs us to  
16 do, but we need to do it under the umbrella of CIPA and we  
17 will do whatever the Court directs us to do.

18 THE COURT: I mean, my guess is there's going to be  
19 categories of expenditures, I mean, just looking at the  
20 indictment, that it would be surprising to me if there is  
21 truly confidential -- I mean classified information that is  
22 relevant for, like, for example, you know, if the government  
23 has proof that there was a video network installed at the  
24 defendant's home that was paid for with the P-Card or a tennis  
25 ball machine or -- you know, I mean some of these things would

1 strike me as not likely to have -- and there may be other  
2 defenses, but not a -- although you may surprise me and it may  
3 be that a tennis ball machine has a classified justification,  
4 but there may be other things, just looking at this, that, you  
5 know, it could be that what you're saying has -- that there  
6 was a contractual justification for that required getting into  
7 the details of what was being done, computers and Otter Box  
8 cases, digital cameras, pin hole cameras, that's the sort of  
9 thing -- maybe that's what you're saying, that that would be  
10 justified by virtue of what the contract was all about.

11 And I don't think I can make a determination on that  
12 without getting into it a little bit more and hearing -- and  
13 so it sounds like that's a procedure we have to start -- we  
14 have to contemplate here.

15 So how do you want to proceed, I guess, Mr. Phillips,  
16 in terms of -- because I don't think I can, you know, reacting  
17 to what I'm seeing here, just say that there's not a  
18 prima facie need for at least inquiring about whether there is  
19 classified information that's implicated here. And I'll  
20 confess I've not personally had a CIPA case before, on the  
21 bench or as an AUSA. So what -- or do you -- do you need time  
22 to consult with the national security folks to sort of propose  
23 a procedure or schedule, both in terms of, you know, what  
24 personnel would have to get cleared, including, you know,  
25 Mr. Gillen and Mr. Lake and my staff. I think CIPA doesn't

1 require me to, but if I have to, that's fine, too. I guess  
2 those would be the questions, who needs to be cleared. I  
3 believe, if I'm not mistaken, we have a facility, I know we've  
4 had CIPA cases here in the courthouse, and I'm assuming we  
5 have a facility in the building, or other appropriate  
6 facility, but I'll need a little guidance, I guess, from you  
7 all about procedurally and scheduling-wise what we do from  
8 here.

9 MR. PHILLIPS: Well, Your Honor, I confess, this is  
10 my first CIPA case as well. So I'm going to rely on advice  
11 from people who are experts. And we've started the process of  
12 reaching out to those folks in Washington and trying to get  
13 them involved and trying to get some guidance from them. We  
14 don't have that yet, but we're in the process of trying to  
15 make that happen as soon as possible.

16 THE COURT: So why don't, for purposes of today, I'll  
17 just say -- I mean, you can give me an estimate now, but  
18 obviously if you need to change it, that's fine. How long do  
19 you think you'll need to submit a plan, a scheduling order  
20 plan, I guess, proposed procedures?

21 MR. PHILLIPS: I think 30 days, Your Honor.

22 THE COURT: Okay. All right. So that's fine. So in  
23 30 days or earlier, if you can do it, and if for whatever  
24 reason you need an extension, you can apply for that, too, but  
25 we'll expect a memorandum plan, I guess I'll call it a

1 scheduling order, so to speak. I don't know if it will  
2 literally have dates, but a schedule for the steps that will  
3 need to be taken and what the procedures will be for dealing  
4 with the -- you know, it sounds to me like  
5 discovery/admissibility determinations and --

6 MR. GILLEN: Well, Your Honor, if I'm reading this  
7 correctly, it's my understanding that, as I said from the case  
8 a minute ago, once the government requests a hearing, then the  
9 Court will be required to make a determination about whether  
10 the information the defendant says he intends to rely on is  
11 relevant.

12 THE COURT: Right, right.

13 MR. GILLEN: And so at that point, I would think, the  
14 Court would decide either this is not relevant, that's the end  
15 of it, or I'm going to allow you to proceed and request  
16 discovery from these, you know, various government entities.

17 THE COURT: Well, I guess that's --

18 MR. GILLEN: So I don't know how we can do that.

19 THE COURT: That would be helpful to lay out in your  
20 30-day submission, in other words, you know, a brief, if you  
21 will, on the application of statute and the determinations  
22 that I'll have to make and/or Judge Totenberg will have to  
23 make.

24 MR. GILLEN: Does the Court still want the defendant  
25 to file a motion to compel or something along that line that

1 identifies with more particularity the kind of information  
2 that he's seeking and why he's seeking it so that we can  
3 respond to that? Or is that all to just come out at the  
4 hearing? Because if it is, it's going to be hard for us to be  
5 prepared to respond to that at the hearing if we're not  
6 hearing about it prior to that.

7 THE COURT: Yeah, I mean, my opinion is I think we  
8 need to get a little bit more concreteness in terms of the  
9 specific information, which may require you getting cleared  
10 first, because, you know, there could be details that you  
11 don't have access to yet.

12 MR. PHILLIPS: Mr. McClain was already cleared and my  
13 request for clearance was sent up today.

14 MR. GILLEN: Well, Your Honor, this is what I would  
15 suggest. We need to follow this procedure. And the act  
16 has -- and there are regs that deal with this process, they  
17 follow right after the act. And so let them get their -- the  
18 direction, it doesn't make sense for us to file a motion to  
19 compel before we get into -- under the umbrella of CIPA.

20 Once we get under the umbrella of CIPA, they're  
21 cleared, we're cleared, then we can, one, obtain information  
22 that we can then give in more detail to the Court and also to  
23 say we think that the government has A, B, C and D and it  
24 should provide it.

25 Now, this isn't -- you know, a CIPA process isn't

1 something where you say, well, you know, gee, you should have  
2 had this material for the CIPA hearing, we only had one day.  
3 It's a process. It's a process that, if done correctly, the  
4 act handles issues concerning the conflict between the  
5 criminal prosecution and defense involving classified  
6 information. So once we get under the -- under the umbrella  
7 of CIPA, then we're going to be better served by saying with  
8 some sort of specificity, okay, we're all under the umbrella,  
9 take a deep breath, now let's -- we're going to tell you what  
10 we -- we think --

11 THE COURT: Right.

12 MR. GILLEN: -- is the defense and what we think you  
13 have that you haven't given us that you should. That's the  
14 way that I think we should do it.

15 THE COURT: And I agree with that. I think -- I  
16 think while Mr. Phillips, I interpreted, is saying is for them  
17 to start getting into it and responding in substance and  
18 sharing information, they need to be -- have a little bit more  
19 granularity, as I feel like I do, to the sort of information  
20 you are contending you either need to get discovery of or use  
21 at trial. And so whether that's referred to as a motion to  
22 compel or in some other way, I think the first step would be,  
23 to put to you, to file something more specific, but not yet,  
24 once we're under CIPA --

25 MR. GILLEN: Yes.

1           THE COURT: -- what it is you're looking for, and  
2 then I can, you know, if necessary, look at it. They can  
3 respond, we can get into detail for -- but it may -- I'm  
4 anticipating, it sounds like, possibly, requiring you to get  
5 cleared first. Because, I don't know, there may be  
6 information that your client has that I'm interpreting from  
7 what you said before that the basis for you in filing the  
8 notice came from the discovery that perhaps your client has  
9 more information that he'd be able to share with you that  
10 says, well, the mini micro pinhole video camera was necessary  
11 because of this, that he can't yet share with you because  
12 you're not cleared. So that's the sort of thing that I think  
13 we need to do first.

14           But once we have all of that happening, including any  
15 clearances that are necessary, I think the first step in  
16 teeing up this dispute of relevancy and discoverability would  
17 be to get from you all a more particularized, I guess,  
18 perfected motion, whether it's a motion to compel or solved in  
19 some other way, but that's what I'm thinking.

20           MR. GILLEN: Well, there are two phases to what I see  
21 in the CIPA, what Dr. Maloney may say himself that he knows  
22 himself, and that's Phase I. Phase II is what the United  
23 States government has that it knows and that it may have in  
24 terms of documentation or testimony that would support  
25 Dr. Maloney's position, which we believe is contrary to what

1 the United States attorney's office has indicted and put  
2 specifically in this indictment.

3 What I would suggest is give them 30 days to file  
4 their requested procedure. We would like 15 days after that  
5 to respond, if we -- if we choose to respond to their proposed  
6 procedure. And then once that's done, then we would be off  
7 and running hopefully.

8 THE COURT: Okay. And that's fine. So let's do  
9 that. So then 30 days from today, and I'll just give a  
10 specific date, just for clarity, that's easy, October 14th,  
11 the same number of day as today. And then 15 days would be --  
12 it would basically be over a weekend, so we'll make it the  
13 next Monday, which will be a Halloween response, October 31st,  
14 which may be appropriate here.

15 UNIDENTIFIED SPEAKER: Can I wear a costume and hand  
16 deliver my response, Your Honor?

17 THE COURT: You may. You may.

18 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

19 THE COURT: And let me go ahead and schedule another  
20 conference for to us discuss where we go. How about -- how  
21 about Friday the 4th of November? Does that work?

22 MR. GILLEN: Yes, sir.

23 THE COURT: I'm sure there will be nothing going on  
24 in the country that's of interest that day, but -- all right.  
25 So let's say 10:00 a.m. on the 4th. If you don't think you're



1 going to respond once you see it, maybe reach out and let us  
2 know. Maybe we can move that up, even if it's just by phone.  
3 We just don't want to still have to wait three weeks if  
4 there's not actually a dispute, for example, about the  
5 procedures. But we'll also make clear that this is not, I  
6 guess, a motion specifically, but I am continuing the pretrial  
7 conference to that date, and in doing so, finding that the  
8 interest of justice in making sure that we balance the --  
9 because there's a prima facie applicability of potential  
10 classified information, the ends of justice in making sure  
11 that we are in compliance with the Classified Information  
12 Procedures Act and in balancing the national security interest  
13 of the United States, but also against the defendant's rights  
14 to a fair trial, to make sure that that balance is handled in  
15 the correct way under the statute. So the need to do that is  
16 what's justifying or requiring this continuance and that  
17 obviously outweighs the defendant's rights otherwise to a  
18 speedy trial as well as the public's.

19           So time, if it weren't already tolled by virtue of  
20 everything else that's been filed here, we'll make sure is  
21 tolled from now through November 4th and likely later, but we  
22 will handle that in a separate order at that point.

23           All right. I'll still hold on to this. And let me  
24 know if you just email Ms. Graves and CC the defense whether  
25 there's anything in here that requires sealing from the

1 government's position or not. It sounds like not and that's  
2 fine. But just let us know.

3 All right. So we have a few other motions. So  
4 the -- we've got the bill of particulars motion. I think I'll  
5 just ask for a response on that unless there's anything that  
6 you want to comment on, Mr. Phillips? And in the response, it  
7 would be helpful if -- you know, there may be things in here  
8 that you don't have a problem with, such as identifying known  
9 co-conspirators.

10 MR. PHILLIPS: Well, Your Honor, the indictment  
11 doesn't allege that there are any unknown co-conspirators, it  
12 identifies the co-conspirators by name.

13 THE COURT: Okay. And maybe that's all he's looking  
14 for is a confirmation that there's no one else, but it sounds  
15 like you just made that confirmation. And I don't know, maybe  
16 there are other things in here that you would see clear to  
17 clarifying or not, but it would be helpful if you could  
18 provide a response. So why don't we use the same 30-day mark,  
19 since we're going to have some delays here anyway, and that's  
20 easier for all of our calendar purposes to not have multiple  
21 days.

22 The motion for access to witnesses, you know, I have  
23 to say I was a little -- you know, without an allegation that  
24 the government is causing or is in any way responsible for  
25 your difficulties in getting access to these witnesses, it

1 struck me as -- somehow I was skeptical for -- it's  
2 obviously -- and you're not proposing that I have -- that I  
3 issue Georgia Tech an order or these witnesses an order,  
4 and --

5 MR. GILLEN: That would be fine as well. All I care  
6 about, Your Honor, I don't think Georgia Tech, and I'm not --  
7 we specifically said we're not suggesting the United States  
8 attorney's office or the Department of Justice is doing this,  
9 but we have, you know, deep concerns about Georgia Tech as an  
10 institution saying, no, you know, you don't -- you don't deal  
11 with or speak with the defense or defense witnesses.

12 An order simply directing to Georgia Tech's general  
13 counsel, Patrick McKenna, simply saying, you know, be advised  
14 that Georgia Tech should be aware of the following, that is  
15 that in this case they cannot instruct any of their employees  
16 or officers to not speak with the defense counsel, but the  
17 choice is simply theirs, they can speak to us or not. A lot  
18 of them probably wouldn't want to speak to us even if they  
19 weren't under some sort of restriction. But that would be a  
20 simple order to the general counsel of Georgia Tech. His name  
21 is Patrick McKenna.

22 MR. PHILLIPS: Your Honor, there is no such  
23 restriction that I'm aware of. And Georgia Tech's counsel has  
24 not been involved in any of the interviews that we've done.  
25 In every single interview that I participated in, we told

1 every witness the defense may try to contact you, it is  
2 totally up to you whether you speak with them, we're not  
3 telling you not to, we can't do that, we wouldn't do that if  
4 we could. It's totally up to you. And they all acknowledged  
5 that they understood that. So we think it would be  
6 inappropriate for the Court to order the government to get  
7 Georgia Tech's general counsel involved and then have them  
8 reach out to witnesses on behalf of the defendant. We don't  
9 think that's appropriate. We've done nothing to restrict  
10 their right to talk to the witnesses. We've paved the way for  
11 them. And I do that as a matter of course in every interview  
12 that I participate in, in every case I've ever had, we want to  
13 make it clear that the government isn't trying to prevent them  
14 from talking to defense counsel.

15 THE COURT: And of course they're not alleging  
16 otherwise. I think that's been clear.

17 MR. GILLEN: That's right.

18 THE COURT: And I do appreciate that.

19 MR. PHILLIPS: In addition, Your Honor, as  
20 Mr. McClain just pointed out to me, there's been no authority  
21 provided that Georgia Tech couldn't tell its employees not to  
22 speak to the defendant's attorneys, if they chose to do that.  
23 I'm not saying that they could. The defendant hasn't made any  
24 showing that that would be improper. I don't know that they  
25 would do anything like that, and I've certainly received no

1 information that they have. No witness has told us in any  
2 shape, form or fashion that they were instructed by anybody on  
3 behalf of Georgia Tech not to cooperate and not to talk to the  
4 defendant. That has not happened.

5 THE COURT: Okay. I'm going to take this under  
6 advisement. I'm going to look at the cases that have been  
7 cited. And if I need a response from the government, I will  
8 order it. I'm not -- I haven't determined whether I'll need  
9 that yet. So let me take this under advisement and consider  
10 it. And I will either issue a ruling or ask for a response  
11 and then issue a ruling and we'll take it from there.

12 We've got the motion for identification of documents,  
13 of Document Number 18.

14 Mr. Phillips, any response to that that you are able  
15 to make?

16 MR. PHILLIPS: Just in the brief research that I've  
17 been able to conduct so far into that, I don't -- I don't  
18 think that is appropriate. I know that there's a published  
19 opinion by Judge Thrash, Judge Schofield, where they looked at  
20 that and they said I'm not going to order the government to do  
21 that. I think it's pretty close to being on point with what  
22 we have here. I don't have the name of the case in front of  
23 me.

24 THE COURT: I thought -- I don't know if that's the  
25 same one that was cited here. Was it the Curranza case? You

1 know, I haven't had a chance, and this is one thing I need to  
2 do is look through the cases. Obviously, I've just received  
3 these motions as well. But I thought it was -- I thought,  
4 according to the defense, in that case they did order an index  
5 of documents, not under Rule 16, but under concepts of due  
6 process and fairness, given the complexity and the voluminous  
7 of the production in that case.

8 MR. PHILLIPS: That's a different issue, though, than  
9 requiring the government to identify the documents that it  
10 intends to rely on at trial. As part of our normal practice,  
11 and we've tried cases against Mr. Gillen and Mr. Lake,  
12 Mr. McClain and I have, we've had no problems working with  
13 them. And our standard practice is to agree to exchange  
14 document lists and exhibit lists and witness lists with the  
15 defense. And we try to work with them and we try to give them  
16 as much information as we can. We're not playing hide the  
17 ball with them. We're going to be very cooperative in working  
18 with them as long as there's a two-way street, and we will  
19 continue to do that.

20 THE COURT: Why don't you give me a response on this  
21 that if you want me to consider some of the things you just  
22 said, offer some of the things you're preparing to give so I  
23 have some concrete understanding of what it is you have given  
24 or would be prepared to give or are willing to offer in order  
25 to assist their analysis of the discovery. And that may help

1 me here a little bit as well. But obviously, the assurance,  
2 don't worry, we'll work it out, just like I need some more  
3 concreteness from them on what they need, I'll need some more  
4 concreteness from you as to what you are giving them in  
5 addition to just the mounds of CDs or whatever it is.

6 MR. GILLEN: Just to clarify, Your Honor.

7 THE COURT: Um-hmm.

8 MR. GILLEN: This motion, which I call the Poindexter  
9 motion, because it emanated from the Poindexter Constitution  
10 in Washington where just a sea of documents were produced.  
11 And it's like that's really not Rule 16 at all if you can't --  
12 you know, going through all these documents. We're not asking  
13 to freeze the government at, you know, gee, you gave us this,  
14 if this motion were to be granted and pursuant to that you  
15 gave us this binder and now you want to add another thing,  
16 that's not what we -- what we are trying to do. This has to  
17 do with good faith, identification of case-in-chief documents  
18 to whittle through all of the thousands upon thousands upon  
19 thousands of invoices and documents that I have personally  
20 reviewed in this case.

21 Now, recently, I know it's not -- this office is not  
22 the Department of Justice antitrust division, but in two  
23 pending cases, one before this Court, the Department of  
24 Justice in Washington has been more than willing to kind of  
25 work with the basic concept of putting together documents and

1 packets for its prosecution, but with the understanding that  
2 no one's -- you know, that I'm not saying that we could, and  
3 I'm certainly saying we would not rush in and say well, we  
4 didn't get this in binder so and so on such and such a date.  
5 That's not what we're after. When -- and I -- and I look  
6 forward to seeing what the government wants to discuss in  
7 terms of documents.

8           What happens in these cases, particularly now in the  
9 electronic age, is the United States attorney's office is very  
10 well prepared, as always, and now they are prepared also with  
11 very computer-savvy support staff that does a great job of  
12 putting their documents up on the screen and then blowing this  
13 up and then having all of that. So without our knowing what  
14 is going to be used --

15           THE COURT: You're pretty good at that, too, though.

16           MR. GILLEN: No, I'm not, frankly. Mr. Lake is a  
17 little better than I am, absolutely, you know, I -- in the  
18 dinosaur era, if they found my bones, they would put me back  
19 in the backroom. Anyway, so it's easier for us because  
20 they're going to go forward and that way for cross-examination  
21 purpose, the efficiency of the running of the trial, judicial  
22 economy, it makes sense to do this. We're not trying to  
23 freeze them. That's all.

24           And if we can -- that's something that's really  
25 important to us, it's important in this case, really important



1 to those antitrust cases because of the -- there's even more  
2 documents in those cases than there are in this case. And so  
3 we spend most of -- or I spend most of my time just basically  
4 reviewing things on my computer in my office, that's my  
5 practice of having to do that. That's fine. That's the life  
6 that we have chosen, profession we've chosen to live.

7 But I would like to have -- this one really is very  
8 important conceptually to get this thing on track for the  
9 defense.

10 MR. PHILLIPS: Your Honor, may I respond briefly?

11 THE COURT: You may, although I'm not sure you guys  
12 are necessarily disagreeing too much right now with each  
13 other. I mean, I think you're saying look, we don't think  
14 under Rule 16 we're required to do this, but yet our  
15 procedures are in cases with lots of discovery and evidence  
16 that we work with them and give them more guidance. And he's  
17 saying I've got this antitrust they gave us, we need more  
18 information, and I'm trying hold them to it.

19 This really strikes me as something that maybe if you  
20 spend 30 days sort of articulating to me what you're able to  
21 offer them or what you have offered them and maybe talk with  
22 each other a little bit more about how you're going to -- how  
23 you're going to provide things voluntarily, let's say, maybe  
24 it might narrow a little bit of what the request ultimately  
25 is. Because what I heard from you, Mr. Gillen, is a little

1 bit narrowing or a little bit more softer than what you're  
2 asking for here, which is identification of case-in-chief  
3 documents prior to trial. Which, you know, if I order that,  
4 then it -- the effect of that is to -- there would be an  
5 argument you'd make, you could make, that if they failed to do  
6 that, they couldn't add later. That would be hard for me in  
7 an order to fashion an out, do you know what I'm saying?

8 MR. GILLEN: The phrase good faith, these -- I have  
9 faith in these two gentlemen that they will act in good faith.

10 THE COURT: Okay.

11 MR. GILLEN: And so if they say in good faith we gave  
12 you this, but now we've looked at something else, we want to  
13 add this, then, you know, these aren't strangers. I know  
14 them. And if they tell me something like that, then I'm going  
15 to accept that representation. This has to do with good  
16 faith. I'm not asking this Court to freeze their  
17 case-in-chief documents. I'm asking for a good-faith  
18 production so that we can try to get as well organized for our  
19 defense as possible.

20 THE COURT: Okay.

21 MR. PHILLIPS: Your Honor.

22 THE COURT: You can respond.

23 MR. PHILLIPS: This is not a case where we have an  
24 uneducated, you know, illiterate defendant. This is a super  
25 smart guy, which he'll tell you, and he knows more about the

1 witnesses who are involved in this case and the documents than  
2 anybody. He can easily go through all of 302s and say this  
3 witness, that witness, and this other witness all have to do  
4 with the P-Card. Here's a group of witnesses that have to do  
5 with the consulting for the Spectra project. He knows that  
6 better than anybody. He knows those people on a first-name  
7 basis. And so the defendant doesn't need us to point them in  
8 the right direction. Their client is capable of doing that  
9 better than anybody.

10 THE COURT: All right. Well, let me -- let me -- let  
11 me get a response from you on that, and then I'll have that  
12 teed up. Let's see. It looks like the only thing left is the  
13 motion to -- for leave to file additional motions, which I  
14 will grant, based on it sounds like the hiccups which are  
15 not -- which are, you know, expected in the ordinary course  
16 sort of technical problems and accessing and getting  
17 discovery, so it's not -- not at fault by any means and you're  
18 not alleging it, but it's just in any complex case with  
19 electronic discovery, there may be hiccups, and that's fine.

20 So let me use the same 30-day marker. Obviously, at  
21 any point, you can file a motion for leave to file additional  
22 motions if you run out of time if there's a showing that could  
23 be made why you couldn't have made the motion before, but --  
24 but let me give you for now the same 30-day marker that I'm  
25 giving the government for responses. And if at that point you

1 feel that you need still more time you can obviously file that  
2 at that time.

3 MR. GILLEN: Thank you, Your Honor.

4 THE COURT: All right. Any experts that the  
5 government anticipates using?

6 MR. PHILLIPS: No, Your Honor.

7 THE COURT: And any 404P that y'all anticipate,  
8 obviously, you're not required at this point to disclose that  
9 but if you anticipate anything, it would help us to discuss  
10 it.

11 MR. PHILLIPS: We don't.

12 THE COURT: All right. Anything else for purposes of  
13 today? Obviously, this won't be the last time we speak.

14 MR. PHILLIPS: No, Your Honor.

15 THE COURT: Okay. All right. Very good, well, we'll  
16 be in adjournment and we will talk to you again on November  
17 the 4th if not before. In the meantime have a happy Columbus  
18 Day, and Halloween, and debate watching or whatever, and -- or  
19 leaf collecting, all various fall activities, college  
20 football, I do have a bone to pick about the Clemson game that  
21 went very badly but that's all I have.

22 MR. PHILLIPS: Thank you Your Honor.

23 MR. GILLEN: Thank you, Judge.

24 THE COURT: All right. We'll be in recess.  
25

1 (Whereupon, the proceedings were adjourned at 10:59  
2 a.m.)  
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## REPORTERS CERTIFICATE

I, Jana B. Colter, Official Court Reporter for the United States District Court for the Northern District of Georgia, with offices at Atlanta, do hereby certify:

That I reported on the Stenograph machine the audiotaped proceedings held in open court on SEPTEMBER 14, 2016, in the matter of USA V. JAMES G. MALONEY, Case No. 1:16-CR-00237; that said proceedings in connection with the hearing were reduced to typewritten form by me; and that the foregoing transcript (37) is a true and accurate record of the proceedings.

This the 2nd day of December, 2016.

/s/ Jana B. Colter, RMR, CRR, CRC  
Official Court Reporter